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7 **UNITED STATES DISTRICT COURT**  
8 **WESTERN DISTRICT OF WASHINGTON**

9 PAUL ASCHERL,

10 Plaintiff,

11 vs.

12 CITY OF ISSAQUAH,

13 Defendants.

Case No. 2:11-cv-01298

14 **PLAINTIFF'S MOTION FOR**  
15 **PRELIMINARY INJUNCTION**  
16 **ORAL ARGUMENT REQUESTED**

17 **NOTE ON MOTION CALENDAR:**  
18 [date:\_\_\_\_\_]  
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27 **PLAINTIFF'S MOTION FOR**  
28 **PRELIMINARY INJUNCTION**  
(Case No. -----)

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1 Plaintiff Paul Ascherl (“Ascherl”), pursuant to Fed. R. Civ. P. 65(a), respectfully moves  
 2 this Court for a preliminary injunction enjoining Defendants and their agents, servants,  
 3 employees, attorneys, and all persons and entities in active concert or participation with them,  
 4 directly or indirectly, from applying Issaquah City Code § 5.40.040, on its face and as applied, so  
 5 as to prevent Ascherl and other third party speakers from engaging in peaceful literature  
 6 distribution on public sidewalks in downtown Issaquah during the 2011 Salmon Days Festival  
 7 and during all subsequent Salmon Days Festivals.

### 8 **STATEMENT OF FACTS**

10 Ascherl is a Christian who shares his religious beliefs with others in public. (Verified  
 11 Complaint, ¶ 12). To accomplish this goal, Ascherl visits public ways and distributes literature  
 12 about his faith. (Affidavit of Paul Ascherl, ¶ 3, filed as Exhibit “A” concurrently with Motion for  
 13 Preliminary Injunction). This medium is an inexpensive and uniquely effective method for  
 14 conveying information. (Ex. “A,” ¶¶ 4-6).

16 While sharing his message, Ascherl does not engage in any type of demonstration, seek  
 17 to draw a crowd, ask for money, or try to gather signatures. (Ex. “A,” ¶ 7). He does not force his  
 18 literature on anyone or create congestion. (Ex. “A,” ¶¶ 9-10). Ascherl typically remains  
 19 stationary and asks passersby if they would like a Gospel tract. (Ex. “A,” ¶ 11).

21 Ascherl desires in particular to distribute literature while standing on the public ways of  
 22 downtown Issaquah during the Salmon Days Festival. (Ex. “A,” ¶ 12). The Salmon Days  
 23 Festival is an annual festival that occurs on the first full weekend of October and celebrates the  
 24 return of salmon to the lakes, streams and hatcheries in Issaquah. (Compl., ¶ 23). The Festival is  
 25 presented by the Greater Issaquah Chamber of Commerce with support from the City of Issaquah

1 and the Issaquah Arts Commission. (Compl., ¶ 23).

2 For the Salmon Days Festival, Issaquah has promulgated rules and regulations, appearing  
3 in Chapter 5.40 of the Issaquah Code of Ordinances. (Compl., ¶ 25; true and correct Copy of  
4 Chapter 5.40 of the Issaquah Code of Ordinances is being filed concurrently with this Motion as  
5 Exhibit “B.”) Pursuant to this ordinance, the Salmon Days Festival is to occur in a significant  
6 portion of downtown Issaquah, encompassing the areas where East Sunset Way intersects Front  
7 Street, Veterans Memorial Park, the Issaquah Hatchery, and other adjacent areas. (Compl., ¶ 26;  
8 true and correct copy of a map for the 2011 Salmon Days Festival is being filed as Exhibit “C,”  
9 also available at the website for the Salmon Days Festival.  
10 ([http://www.salmondays.org/design\\_images/maps/FESTIVAL-MAP-2010-LG.jpg](http://www.salmondays.org/design_images/maps/FESTIVAL-MAP-2010-LG.jpg).) These areas  
11 remain free and open to the general public, allowing pedestrians to enter at various points. (Ex.  
12 “A,” ¶ 13; Compl., ¶ 26). There are no specific points of entry into the Salmon Days Festival.  
13 (Compl., ¶ 26).

14 The Salmon Days Festival hosts various activities and events. (Compl., ¶ 27). Festival  
15 attendees can enjoy exhibits, booths, a parade, a “Foods of the World” exhibition, 5K and 10K  
16 runs, live entertainment, and a “Field of Fun event” where children ride ponies, jump on  
17 trampolines, and play on inflatables. (Compl., ¶ 27). The Festival booths are available to food  
18 vendors, arts and crafts vendors, and non-profit organizations, but anyone renting a booth must  
19 pay an application fee, a rental fee, and provide proof of insurance. (Compl., ¶ 28; a true and  
20 correct copy of the application and rules to obtain a booth for the 2011 Salmon Days Festival is  
21 being filed as Exhibit “D.” These rules are also available at the website for the Salmon Days  
22 Festival. (<http://www.salmondays.org/index.php>)). The only non-profit organizations eligible for  
23

1 a booth are those “located in Issaquah and/or are significant providers to the Issaquah  
2 community.” (Compl., ¶ 29).

3 During Salmon Days Festival, parts of East Sunset Way and Front Street are closed to  
4 vehicular traffic, while remaining open to pedestrian traffic, permitting pedestrians free access to  
5 these streets and adjoining sidewalks. (Ex. “A,” ¶ 14). East Sunset Way and Front Street  
6 maintain their function as public thoroughfares and part of the city’s transportation grid. (Ex.  
7 “A,” ¶ 14). Citizens continue to use these public ways during Salmon Days Festival to reach  
8 various parts of the city, including a variety of businesses. (Ex. “A,” ¶ 14).

10 On Saturday, October 2, 2010, Ascherl and two friends went to downtown Issaquah to  
11 express their Christian beliefs via literature distribution and dialogue. (Ex. “A,” ¶ 15). Ascherl  
12 chose this place and time because he wanted to reach the large audience attending the Festival.  
13 (Ex. “A,” ¶ 16). At no point did Ascherl attempt to participate in or disturb Festival activities.  
14 (Ex. “A,” ¶¶ 17-19).

16 When Ascherl arrived downtown, he began walking on Front Street, near where Front  
17 Street intersected NE Dogwood St., as he distributed literature and dialogued. (Ex. “A,” ¶ 20).  
18 Ascherl observed many other people walking around and standing in the same area as they ate  
19 food, watched festival activities, talked to each other, and waited in line. (Ex. “A,” ¶ 21).

21 Ascherl engaged in his expressive activity for approximately five minutes when a female  
22 Festival official approached him and ordered him to stop distributing literature. (Ex. “A,” ¶ 22).  
23 Ascherl declined and the official left to go get the police. (Ex. “A,” ¶ 22). Ascherl continued to  
24 distribute literature for about 30 more minutes until two police officers with the Issaquah Police  
25 Department approached him. (Ex. “A,” ¶¶ 23-24). The officers inquired about his literature and

1 wanted to make sure he was not harassing anyone. (Ex. "A," ¶ 25). After Ascherl assured them  
2 of his peaceful activities, the police permitted him to continue with his literature distribution.  
3 (Ex. "A," ¶ 25).

4 A few minutes later, though, the police approached Ascherl again, accompanied by the  
5 same female festival organizer that spoke with Ascherl before. (Ex. "A," ¶ 26). This time the  
6 officers ordered Ascherl to stop distributing literature. (Ex. "A," ¶ 26). Ascherl asserted his right  
7 to distribute literature on a public sidewalk. (Ex. "A," ¶ 26). Ascherl also asked about the  
8 existence of any law prohibiting his literature distribution. (Ex. "A," ¶ 26). The police officers  
9 left, but soon returned, and showed Ascherl a copy of Issaquah City Code § 5.40.040. (Ex. "A," ¶  
10 28). According to the officers, this ordinance prohibited all literature distribution except in two  
11 specific "free speech zones." (Ex. "A," ¶ 29). The police officers also advised Ascherl that he  
12 would be guilty of a misdemeanor and subject to arrest if he continued to distribute literature  
13 outside of these zones. (Ex. "A," ¶ 29).

14 Though Ascherl wanted to continue to distribute literature in his chosen location, he did  
15 not want to be arrested; so he went to one of the designated free speech zones. (Ex. "A," ¶ 30).  
16 The first free speech zone was located near the intersection of Front St. and Sunset Way, very  
17 close to the Front St. Stage where various musicians were playing. (Ex. "A," ¶ 31). Hardly  
18 anyone was in or near the area because it was so out of the way, and Ascherl could not converse  
19 with anyone because it was so loud. (Ex. "A," ¶¶ 31-32). Unable to convey his message at the  
20 first speech zone, Ascherl left for the second speech zone. (Ex. "A," ¶ 32).

21 The second free speech zone was located on West Sunset Way on a bridge near the  
22 Issaquah Hatchery and the intersection of West Sunset Way and Newport Way. (Ex. "A," ¶ 33).

1 Like the first speech zone, few people came near this area. (Ex. "A," ¶ 34). Since people can  
 2 enter the Festival from almost any location, Ascherl missed 99% of the people attending the  
 3 Festival. (Ex. "A," ¶ 34). After trying to distribute literature in both of the so-called free speech  
 4 zones, Ascherl realized that neither space offered a suitable place for his expression. (Ex. "A," ¶  
 5 35). Ascherl thus discontinued his activities and left the Salmon Days Festival. (Ex. "A," ¶ 35).

7 The ordinance used to silence Ascherl, § 5.40.040 of the Issaquah City Code, is entitled  
 8 "Designated areas for leafleting, entertaining, and nonprofit distribution" (hereinafter "anti-  
 9 leafleting ordinance") and reads:

10 **5.40.040 Designated areas for leafleting, entertaining, and nonprofit**  
 11 **distribution.**

12 A. The City of Issaquah hereby establishes designated "expression areas" within  
 13 the festival area for leafleting, organized protesting, nonscheduled entertainment,  
 14 and nonprofit distribution. These designated expression areas shall be located by  
 15 the Festival Events Division of the Greater Issaquah Chamber of Commerce in  
 16 such a way as to minimize interference with the orderly flow of pedestrian traffic  
 17 through the festival area while still providing an area for members of the public to  
 18 freely express themselves. The locations of the designated expression areas shall  
 19 be subject to approval by the City Council prior to Salmon Days.

20 B. The Festival Events Division of the Greater Issaquah Chamber of Commerce  
 21 shall ensure that adequate trash receptacles are located in these designated areas.

22 C. The designated expression areas shall be marked by at least one sign  
 23 containing the words "expression area" so that police officers and Salmon Days  
 24 volunteers are able to direct persons wishing to partake of these activities to that  
 25 area.

26 D. No person shall erect a table, easel, soapbox, stand, or similar structure which  
 27 could interfere with pedestrian traffic within the festival area, including the  
 28 designated expression areas, without the written permission of the Festival Events  
 Division of the Greater Issaquah Chamber of Commerce.

E. No leafleting, organized protesting, non-scheduled entertainment, or nonprofit  
 distribution shall be allowed outside of a booth or the above-established,  
 designated expression areas.

1 F. Violation of this section shall constitute a misdemeanor. Before enforcing this  
 2 section, police officers shall give a verbal warning informing the violator of this  
 3 chapter and of the location of the designated expression areas where such  
 4 activities are allowed. If the violator continues the activity after this warning the  
 5 police may arrest the violator.

6 G. Nothing in this section should be read to prevent attendees from expressing  
 7 themselves through purely oral communication at any location within the festival  
 8 area. Nothing in this section should be read to prevent attendees from carrying  
 9 signs at any location within the festival area so long as the sign conforms with  
 10 IMC 5.40.050.

11 This anti-leafleting ordinance deters Ascherl's expression because it bars literature  
 12 distribution during Salmon Days Festival outside of two remote areas and also because it  
 13 prohibits anyone from standing on boxes in the free speech zone in order to attract people. (Ex.  
 14 "A," ¶¶ 37-38). These requirements impose intolerable burdens on Ascherl's expression, keeping  
 15 him from effectively distributing literature to his intended audience. (Ex. "A," ¶ 35). For fear of  
 16 arrest, Ascherl cannot return to public ways of downtown Issaquah during the Salmon Days  
 17 Festival and distribute literature in areas where he can reach a meaningful audience. (Ex. "A," ¶  
 18 38). If not for the anti-leafleting ordinance, and the actions of Defendants in enforcing this  
 19 ordinance, Ascherl would return to the 2011 Salmon Days Festival and subsequent festivals to  
 20 share his message via literature distribution and conversation. (Ex. "A," ¶ 38).

## 21 ARGUMENT

22 A request for a preliminary injunction relates to four factors: (I) the likelihood of  
 23 Plaintiff's success on the merits; (II) the likelihood of irreparable harm to the Plaintiff in the  
 24 absence of relief; (III) the balance between the harm to the Plaintiff and the harm that the relief  
 25 would cause to the other litigants; and (IV) the public interest. *Stormans, Inc. v. Selecky*, 571  
 26 F.3d 960, 977-78 (9th Cir. 2009). These factors favor Ascherl receiving his requested injunctive

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 28 PRELIMINARY INJUNCTION-6  
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1 relief.

2 **I. ASCHERL IS LIKELY TO SUCCEED ON MERITS**

3 Forum analysis is used to evaluate regulations impacting free expression on public  
4 property. This process entails three inquiries: A) the extent to which expressive activity is  
5 protected, B) the nature of the forum, and C) the appropriate level of scrutiny to be applied.  
6  
7 *Currier v. Potter*, 379 F.3d 716, 734-35 (9th Cir. 2004).

8 **A. Ascherl's Expression Deserves First Amendment Protection**

9 Ascherl wants to share his religiously-held beliefs through literature and conversation.  
10 (Ex. A, ¶¶ 2-12). These innocuous methods constitute speech protected under the First  
11 Amendment. *See, e.g., Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S.  
12 640, 647 (1981) (noting that oral and written dissemination of religious viewpoint are protected  
13 speech); *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) (explaining that the hand  
14 distribution of religious tracts “has the same claim as the others to the guarantees of freedom of  
15 speech and freedom of the press...”).  
16  
17

18 **B. Sidewalks in Downtown Issaquah are Traditional Public Fora**

19 The propriety of restrictions imposed on protected speech turns on the character of the  
20 property where the speech takes place. *Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (citation  
21 omitted). The Ninth Circuit recognizes three general types of property for speech purposes:  
22 traditional, designated, and nonpublic fora. *Flint v. Dennison*, 488 F.3d 816, 830 (9th Cir. 2007).  
23 Traditional public fora are places that, by long tradition, have been devoted to assembly and  
24 debate. *Id.* Designated public fora are areas that the government has intentionally dedicated to  
25 expressive activity. *Id.* Nonpublic fora are areas that have not by tradition or designation been  
26



1 opened to expressive activity. *Id.*

2 Ascherl would like to express his beliefs on the public ways in downtown Issaquah. (Ex.  
3 A, ¶ 12). These public ways --- sidewalks and streets --- constitute “prototypical” examples of  
4 traditional public fora. *Schenck v. Pro Choice Network of Western New York*, 519 U.S. 357, 358  
5 (1997). To be sure, “[w]herever the title of streets and parks may rest, they have immemorially  
6 been held in trust for the use of the public and, time out of mind, have been used for purposes of  
7 assembly, communicating thoughts between citizens, and discussing public questions.” *Hague v.*  
8 *CIO*, 307 U.S. 496, 515 (1939). *See also Hill v. Colorado*, 530 U.S. 703, 715 (2000) (noting that  
9 “Public sidewalks, streets, and ways...are ‘quintessential’ public forums for free speech.”);  
10 *ACLU of Nevada v. City of Las Vegas*, 333 F. 3d 1092, 1099 (9th Cir. 2003) (“The quintessential  
11 traditional public forums are sidewalks, streets, and parks.”); *Acorn v. City of Phoenix*, 798 F.2d  
12 1260, 1266 (9th Cir. 1986) (noting that the Supreme Court has “listed ‘sidewalks’ separately as  
13 an additional example of traditional public fora...”). For this reason, no “particularized” inquiry  
14 is required for these areas. *Frisby*, 487 U.S. at 481.

15 Issaquah is not at liberty to change the status of these public ways. Traditional public  
16 fora “are open for expressive activity regardless of the government's intent.” *Ark. Educ.*  
17 *Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998). Traditional public fora cannot be  
18 transformed into non-public fora by government whim. “Congress, no more than a suburban  
19 township, may not by its own ipse dixit destroy the ‘public forum’ status of streets and parks  
20 which have historically been public forums...” *United States Postal Service v. Council of*  
21 *Greenberg Civic Ass’n.*, 453 U. S. 114, 133 (1981). *See also United States v. Grace*, 461 U.S.  
22 171, 175 (1983) (government may not “transform the character of the property by the  
23

24 PLAINTIFF’S MOTION FOR  
25 PRELIMINARY INJUNCTION-8  
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expedient of including it within the statutory definition of what might be considered a non-public forum parcel of property.”); *ACLU of Nevada*, 333 F. 3d at 1103-05 (ruling that sidewalk in downtown Las Vegas was still a traditional public forum regardless of city’s intent and unique features of sidewalk). Because the public ways in question remain free and open to the public during Salmon Days Festival (Ex. A, ¶¶ 13-14), these public ways remain traditional public fora during the entirety of this event.

The Ninth Circuit drew a similar conclusion in *Gathright v. City of Portland*, 439 F.3d 573, 575 (9th Cir. 2006). In *Gathright*, Portland gave permits to private parties to conduct particular events in a public park and in a town square and allowed these private parties to remove speakers from these areas. *Id.* In evaluating this issue, the Ninth Circuit applied the time, place, manner standard against Portland’s permit scheme --- the standard only appropriate for regulations on expression in a traditional public forum. *Id.* at 578.

With this analysis, the Ninth Circuit is far from an outlier. Every single circuit to consider the issue has concluded that public streets and parks remain traditional public fora during festivals that are free and open to the public. *See, e.g., Startzell v. City of Philadelphia*, 533 F.3d 183, 197 (3d Cir. 2008) (“Furthermore, like the Arts Festival in Parks, OutFest took place in the streets and sidewalks of Philadelphia, an undisputed quintessential public forum. The issuance of a permit to use this public forum does not transform its status as a public forum.”); *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 879 (9th Cir. 2008) (explaining that “Plaintiff’s activities occurred in a traditional public forum” even though activities occurred in public square during permitted festival); *Parks v. City of Columbus*, 395 F.3d 643, 652 (6th Cir. 2005) (explaining “that one’s constitutionally protected rights disappear because a private party is hosting an event

1 that remained free and open to the public. Here, Parks attempted to exercise his First  
 2 Amendment free speech rights at an arts festival open to all that was held on the streets of  
 3 downtown Columbus. Under these circumstances, the streets remained a traditional public forum  
 4 notwithstanding the special permit that was issued to the Arts Council.”).

5 Government entities cannot alter the status of public streets and parks via permitting  
 6 process. The sidewalks and public ways in downtown Issaquah remain traditional public fora  
 7 throughout the Salmon Days Festival.  
 8

9 **C. Anti-Leafleting Ordinance is Overbroad and Not Narrowly Tailored to Any**  
 10 **Significant Government Interest**

11 The classification of downtown sidewalks and ways as traditional public fora is  
 12 significant because “[i]n such fora, the government’s right ‘to limit expressive activity [is]  
 13 sharply circumscribed.’” *Berger v. City of Seattle*, 569 F.3d 1029, 1036 (9th Cir. 2009) (*en*  
 14 *banc*). To be valid, a regulation on expression in a traditional public forum must be content-  
 15 neutral, narrowly tailored to serve a significant governmental interest, and leave open ample  
 16 alternative channels for communication. *Id.* Issaquah’s anti-leafleting ordinance, in banning all  
 17 leafleting in all public areas of downtown Issaquah except for two isolated zones, does not serve  
 18 any significant interest in a narrowly tailored way.<sup>1</sup>  
 19  
 20  
 21

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22 <sup>1</sup> Just as Issaquah’s anti-leafleting ordinance lacks narrow tailoring, it is also facially overbroad.  
 23 The overbreadth doctrine allows a plaintiff to challenge a law “because of a judicial prediction or  
 24 assumption that the statute’s very existence may cause others not before the court to refrain from  
 25 constitutionally protected speech or expression.” *Nunez by Nunez v. City of San Diego*, 114 F.3d  
 26 935, 949 (9th Cir. 1997) (citation omitted). Because arguments showing overbreadth and narrow  
 27 tailoring are so similar, courts routinely treat these arguments together. *See, e.g., American-Arab*  
 28 *Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 606 n.3 (6th Cir. 2005) (noting  
 that reasoning about lack of tailoring led to same conclusion on overbreadth grounds); *Boardley*  
*v. U.S. Dep’t of Interior*, 605 F.Supp.2d 8, 19 (D.D.C. 2009) (“Courts have recognized that a  
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Under the narrow tailoring requirement, regulations cannot “burden substantially more speech than is necessary to further the government's legitimate interests.” *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). A restriction is “narrowly tailored” only if it eliminates no more evil than it seeks to remedy. *Frisby*, 487 U.S. at 485. And, abstract goals are not enough. “[T]he First Amendment demands that municipalities provide ‘tangible evidence’ that speech-restrictive regulations are ‘necessary’ to advance the proffered interest...” *Edwards v. City of Coeur d'Alene*, 262 F.3d 856, 863 (9th Cir. 2001) (citation omitted). The availability of less burdensome alternatives indicates a lack of appropriate tailoring. *See Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1041 (9th Cir. 2006). With this benchmark in mind, Issaquah’s anti-leafleting ordinance fails because it unduly bans all literature distribution in a traditional public forum (public sidewalks and ways).

Issaquah’s anti-leafleting ordinance demonstrates a disconnect between its purported purpose and its impact on expression. Any purported concerns about security, litter, or congestion cannot justify Issaquah’s broad restriction on speech. *See Kuba v. I-A Agr. Ass’n*, 387 F.3d 850, 859 (9th Cir. 2004) (“merely invoking interests ... is insufficient. The government must also show that the proposed communicative activity endangers those interests.”). There is nothing inherent about the act of literature distribution that would invoke security, litter, or congestion concerns. Issaquah permits a plethora of activities to occur in the Festival area --- waiting in line, standing around and conversing, eating --- that cause just as much – if not more

substantial overbreadth claim is similar, if not identical, to a claim that a prior restraint is not narrowly tailored.”). For these reasons, Ascherl can appropriately consolidate these arguments, for by showing Issaquah’s anti-leafleting ordinance to lack tailoring, he also shows the ordinance to be overbroad.

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1 – congestion, litter, and safety problems. (Ex. A, ¶ 21). *See Lederman v. United States*, 291 F.3d  
 2 36, 45 (D.C. Cir. 2002) (“Some banned activities, however, cannot possibly pose that risk [of  
 3 traffic control and safety]. For example, a single leafleteer standing on the East Front sidewalk  
 4 will no more likely block traffic or threaten security than will photographers, star-struck tourists,  
 5 and landscape painters complete with easels, but the Board has made no effort to keep any of  
 6 these latter individuals away from the Capitol.”).

8 In *Berger v. City of Seattle*, the City of Seattle imposed a variety of requirements on  
 9 individual street performers in one of its crowded public parks. 569 F.3d 1029, 1035 (9th Cir.  
 10 2009). Seattle defended its permit requirement as necessary to further “its interest in protecting  
 11 the safety and convenience of park-goers by reducing territorial disputes among performers,  
 12 deterring harassment of audience members, and ‘clarifying and coordinating potentially  
 13 competing uses.’” *Id.* at 1041. In other words, Seattle tried to justify its regulation as a means to  
 14 enhance security in the crowded park, but the Ninth Circuit rejected this rationale:

16 The permitting requirement is, according to the City, designed in part to reduce  
 17 obstreperous conduct by street performers. Yet, by the City's own account, most  
 18 street performers are not problematic. So the permitting requirement burdens all  
 19 performers to root out the occasional bad apple. By doing so, it fails to “target[ ]  
 and eliminate[ ] no more than the exact source of the ‘evil’ it seeks to remedy.”

20 *Id.* at 1045-46 (citation omitted). *See also Boardley v. U.S. Dept. of Interior*, 615 F.3d 508, 522  
 21 (D.C. Cir. 2010) (“But why are individuals and members of small groups who speak their minds  
 22 more likely to cause overcrowding, damage park property, harm visitors, or interfere with park  
 23 programs than people who prefer to keep quiet? We fail to see why an individual’s desire to be  
 24 communicative is a strong proxy for the likelihood that she will pose a threat to park security or  
 25 accessibility. No doubt some individuals and small groups will cause these problems, but many

1 will not; and the government has not explained why those engaged in free expression are more  
 2 likely to be problematic than anyone else.”) (citations omitted).

3 Likewise, there is no question that most people distributing literature at Salmon Days  
 4 Festival (like Ascherl) do not generate any real concern. (Ex. A, ¶ 20). Banning all literature  
 5 distribution to “root out the occasional bad apple,” Issaquah’s restriction unnecessarily prohibits  
 6 a vast amount of activity that is harmless, making Issaquah’s ban overbroad.

7  
 8 Bans on literature distribution are routinely invalidated because such bans do not  
 9 necessarily prevent litter, congestion, or safety problems. In *International Soc. for Krishna*  
 10 *Consciousness, Inc. v. Lee*, for instance, airport authorities banned solicitation of money and  
 11 literature distribution in an airport terminal in order to minimize congestion in that confined,  
 12 highly trafficked area. 505 U.S. 672, 675-76 (1992). After the Supreme Court found the terminal  
 13 to be a non-public forum, and upheld the ban on soliciting money, *id.* at 680-84, it invalidated  
 14 the ban on literature distribution. *Id.* at 690-93.<sup>2</sup> In so doing, the Supreme Court distinguished  
 15 literature distribution from monetary solicitation, explaining that the former does not create any  
 16 congestion problem since it “does not require that the recipient stop in order to receive the  
 17 message the speaker wishes to convey; instead the recipient is free to read the message at a later  
 18 time.” *Id.* at 690 (citation and quotations omitted). Surely, if the congestion/safety/access  
 19 rationale does not warrant a literature distribution ban in an enclosed and crowded airport  
 20 terminal --- a non-public forum where regulations need only be reasonable --- then that same  
 21 rationale cannot warrant a ban on literature distribution in a wide open public park --- a  
 22  
 23  
 24  
 25

26 <sup>2</sup> On this point, Justice O’Conner’s concurring opinion in *Lee* is the controlling opinion. *See,*  
 27 *e.g., Preminger v. Sec’y of Veterans Affairs*, 517 F.3d 1299, 1316 n.6 (Fed. Cir. 2008).

1 traditional public forum where regulations must overcome a much higher standard. *See also*  
 2 *Grace*, 461 U.S. at 176 (invalidating ban on literature distribution on sidewalk around Supreme  
 3 Court because such ban not narrowly tailored to prevent congestion or ensure safety); *Ward*, 491  
 4 U.S. at 799 n.7 (explaining that literature distribution does not cause “traffic congestion”);  
 5 *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (“[The right to distribute literature] may  
 6 not be withdrawn even if it creates the minor nuisance for a community of cleaning litter from its  
 7 streets.”); *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939) (“We are of opinion that the  
 8 purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance  
 9 which prohibits a person rightfully on a public street from handing literature to one willing to  
 10 receive it.”); *Lederman*, 291 F.3d at 43 (“If people entering and leaving the Capitol can avoid  
 11 running headlong into tourists, joggers, dogs, and strollers...then we assume they are also  
 12 capable of circumnavigating the occasional protester.”).

15 A festival setting cannot justify a ban on literature distribution. The Sixth Circuit recently  
 16 confronted this issue in *Saieg v. City of Dearborn*, 641 F.3d 727 (6th Cir. 2011). There, Dearborn  
 17 banned literature distribution throughout a street festival, free and open to the public. *Id.* at 729-  
 18 32. Because of this ban, speakers could not distribute literature on public sidewalks and streets  
 19 located in the Festival’s “inner perimeter,” but they could distribute literature from certain booths  
 20 and tables within the festival. *Id.* Dearborn claimed this ban was necessary to relieve “pedestrian  
 21 overcrowding,” enhance “traffic flow,” minimize “threats to public safety,” and limit  
 22 “disorderliness at the Festival.” *Id.* at 736. The Sixth Circuit declined to follow this logic because  
 23 the Festival was still “open for public traffic:”  
 24

26 The sidewalks may well host more traffic during the Festival than they do on  
 27 other days of the year. Nevertheless, the defendants have chosen to keep the

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sidewalks open for public use, showing that the interests in crowd control and public safety are not so pressing that they justify restricting normal activity that occurs on streets and sidewalks. Therefore, because Festival organizers permit public traffic on the sidewalks next to Warren Avenue, the interest in curtailing First Amendment expression on those sidewalks is not substantial.

*Id.* at 737. Just like Dearborn, Issaquah has chosen to keep its Festival open for public use and open to a wide variety of activities that create just as many (if not more) problems than literature distribution. As a result, Issaquah cannot credibly rely on congestion or safety concerns to single out and ban literature distribution only. Ascherl and others should be able to “leaflet from any street or sidewalk that remains open for typical, non-Festival pedestrian traffic, even if the street or sidewalk is simultaneously used for Festival traffic.” *Id.* at 741. *See also Teesdale v. City of Chicago*, No. 09 C 4046, 2011 WL 2143027 at \*6, 10 (N.D.Ill. May 26, 2011) (enjoining ban on literature distribution on public streets in festival free and open to the public).

Nor does the availability of two “speech zones” for literature distribution negate the adverse impact on speech. Issaquah still bans literature distribution in 99% of the Festival area. The so-called speech zones are not adequate alternatives since they are located in remote areas where hardly anyone travels. (Ex. A, ¶¶ 31-35). *See, e.g., Weinberg v. City of Chicago*, 310 F.3d 1029, 1041 (7th Cir. 2002) (“The mere existence of an alternative method of communication cannot be the end of the analysis. We must also give adequate consideration to whether the alternatives are ample. Whether an alternative is ample should be considered from the speaker's point of view.”). Allowing expression in two small, isolated “speech zones” pales in comparison to the “anti-speech zones” that cover the rest of downtown Issaquah.<sup>3</sup> Issaquah cannot

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<sup>3</sup> Consequently, Issaquah’s anti-leafleting ordinance also does not leave open alternative avenues of communication. *See, e.g., Edwards*, 262 F.3d at 866 (“[i]f an ordinance effectively prevents a



1 substantiate its ban on literature distribution by pointing to alternative avenues where  
 2 communication can occur. *See Schneider*, 308 U.S. at 163 (“...one is not to have the exercise of  
 3 his liberty of expression in appropriate places abridged on the plea that it may be exercised in  
 4 some other place.”); *Saieg*, 641 F.3d at 740 (“Thus, the leafleting restriction is unconstitutional  
 5 even if it leaves open ample alternative channels of communication.”); *American-Arab Anti-*  
 6 *Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 607 (6th Cir.2005) (“Lastly, the city  
 7 of Dearborn claims that because it has provided ample alternative means of communication,  
 8 namely Dearborn City Hall and Dearborn parks, the thirty-day notice period does not pose a  
 9 substantial burden on free expression. However, whether the thirty-day notice period is narrowly  
 10 tailored is a separate question, to be taken on its own...providing ample alternative means of  
 11 communication will not cure a defective regulation if Dearborn's thirty-day notice provision  
 12 sweeps too broadly.”); *NAACP v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984)  
 13 (“[L]aws regulating public fora cannot be held constitutional simply because they leave potential  
 14 speakers alternative fora for communicating their views.”). Issaquah must demonstrate that the  
 15 prohibition on speech is necessary.

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 19 In *Gerritsen v. City of Los Angeles*, 994 F.2d 570 (9th Cir. 1993), a city banned literature  
 20 distribution in certain areas of a public park demarcated by blue lines. *Id.* at 573-74. Because  
 21

22  
 23 speaker from reaching his intended audience, it fails to leave open ample alternative means of  
 24 communication.”). Indeed, the Ninth Circuit has commonly invalidated regulations for failing to  
 25 leave open alternative avenues of communication when those regulations confined speakers to  
 26 impractical “speech zones.” *See, e.g., United States v. Baugh*, 187 F.3d 1037, 1044 (9th Cir. 1999)  
 27 (forcing protestors into free speech zone 150 yards away from those entering visitor center failed  
 28 to leave open alternative avenues); *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229  
 (9th Cir. 1990) (requiring a 75-yard security zone between demonstrators and intended audience  
 did not leave open ample alternative means of communication).

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1 these areas were very crowded and near a consulate building, the city defended the ban as  
2 necessary to maintain “a calm, secure environment” and to avoid “congestion in these often  
3 crowded areas.” *Id.* at 577. The Ninth Circuit invalidated the regulation for infringing on too  
4 much harmless expression:

5       To the extent that City officials sought to curtail unprotected activity in the blue-  
6 line areas (such as disruption of other legitimate park activities, the business of  
7 the Mexican Consulate, or visitors' enjoyment of the park), the total ban on  
8 handbill distribution is substantially broader than necessary. Moreover, City  
9 officials already had in place regulations to prevent these behaviors, as indicated  
10 by the occasions (some of which are described later in this opinion) when park  
officials did not hesitate to enforce laws aimed at Gerritsen's unprotected,  
disruptive conduct. Thus, a total ban on this activity in these areas is unjustified.

11 *Id.* at 577.

12       Importantly, the regulation in *Gerritsen* did not erect a complete ban on expression in the  
13 entire park; it only barred expression “in certain areas of the park (indicated by blue  
14 demarcations on the pavement)” that the government claimed were very crowded. 994 F.2d at  
15 573. Indeed, the Ninth Circuit explicitly acknowledged that the challenged regulation allowed  
16 alternative avenues of communication because “Gerritsen could leaflet in other areas of the  
17 park...” under the regulation. *Id.* at 577. Practically, the regulation in *Gerritsen* created speech  
18 zones in the park where literature distribution was allowed and anti-speech zones in the park  
19 where literature distribution was prohibited.

20       Despite the existence of alternative avenues for communication within the park, the Ninth  
21 Circuit still invalidated the regulation for insufficient tailoring because it banned activities  
22 (literature distribution) that did not threaten the “calm, secure environment” or create  
23 “congestion in these often crowded areas.” *Id.* at 577. *Gerritsen* is directly on point, for just like  
24 here, the government broadly banned expression in some areas of a traditional public forum that

1 did not threaten the government's alleged interests. *See also Saieg*, 641 F.3d at 732 (invalidating  
 2 ban on literature distribution in festival despite ability of persons to distribute literature from a  
 3 booth located "in the central area" of the festival); *Kuba*, 387 F.3d at 859-62 (invalidating  
 4 regulation that limited expression, except conversation, to particular zones in traditional public  
 5 fora); *ACLU of Nevada*, 333 F.3d at 1106 (rejecting congestion rational as justification for  
 6 banning literature distribution in particular city sidewalk even though literature distribution  
 7 allowed on nearby sidewalks); *Lederman*, 291 F.3d at 39-40 (invalidating ban on literature  
 8 distribution in no-demonstration zone on sidewalk on Capitol grounds even though expression  
 9 was allowed in nearby lawn area on Capitol grounds); *Roberts v. Haragan*, 346 F.Supp.2d 853,  
 10 869-70 (N.D.Tex. 2004) (invalidating university regulation for lack of tailoring because it  
 11 limited students' expression outside of free speech zones).

12  
 13  
 14 Issaquah's ban should be invalidated for the same reasons: the ban is not narrowly  
 15 tailored to serve any significant government interest.

## 16 **II. ASCHERL IS SUFFERING IRREPARABLE HARM**

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 18 Without the requested injunction, Ascherl is continually prevented from exercising his  
 19 First Amendment rights in a traditional public forum. Ascherl desires to distribute literature at  
 20 the upcoming 2011 Salmon Days Festival and all future Festivals but the fear of punishment  
 21 prevents him from doing so. The loss of his constitutional right to speak is both actual and  
 22 imminent, and such loss results in irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct.  
 23 2673, 2690, 49 L.Ed.2d 547 (1976). *See also Sammartano v. First Judicial District Court*, 303  
 24 F.3d 959, 973 (9th Cir. 2002) ("[A] party seeking preliminary injunctive relief in a First  
 25 Amendment context can establish irreparable injury sufficient to merit the grant of relief by  
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1 demonstrating the existence of a colorable First Amendment claim.”) (quotation marks and  
2 citation omitted).

### 3 **III. INJUNCTION WILL CAUSE NO HARM TO DEFENDANTS**

4 Granting Ascherl’s request for injunctive relief will cause no harm to Defendants. They  
5 have no legitimate interest in enforcing an unconstitutional policy. *See, e.g., Newsom ex rel.*  
6 *Newsom v. Albemarle County School Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (noting that  
7 defendants are “in no way harmed by issuance of a preliminary injunction which prevents it  
8 from enforcing a regulation, which, on this record, is likely to be found unconstitutional.”).

### 9 **IV. PUBLIC INTEREST FAVORS INJUNCTIVE RELIEF**

10 In this matter, the public interest will not be served by the continued discrimination  
11 against Ascherl’s speech. Rather, the public is best served by preserving public discourse. *See*  
12 *Sammartano*, 303 F.3d at 974 (“Courts considering requests for preliminary injunctions have  
13 consistently recognized the significant public interest in upholding First Amendment  
14 principles.”).

### 15 **CONCLUSION**

16 For the foregoing reasons, Plaintiff respectfully requests this Court to grant his Motion  
17 for Preliminary Injunction.  
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1 Respectfully submitted this 5th day of August, 2011.

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